Filed 3/30/10 Norwood v. Rose Hills Co. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

EILEEN NORWOOD, Plaintiff and Appellant, v. ROSE HILLS COMPANY etc., Defendant and Respondent.	B211925 (Los Angeles County Super. Ct. No. VC048591)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez and Raul A. Sahagun, Judges. Reversed.

Law Office of Greg May and Greg May for Plaintiff and Appellant.

Larson, Garrick & Lightfoot, John M. Garrick and Andrew K. Doty for Defendant and Respondent.

I.

INTRODUCTION

In this slip and fall case, plaintiff and appellant Eileen Norwood (Norwood) appeals from a summary judgment entered in favor of Rose Hills Company, doing business as Rose Hills Memorial Park and Mortuary (Rose Hills). We reverse.

II.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying facts.*

Following the usual standard of a review from the entry of a summary judgment, we construe the facts in the light most favorable to Norwood, the party who opposed the motion for summary judgment. (*Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 3, fn. 1.)

On Mother's Day morning of Sunday, May 8, 2005, Norwood and her husband went to visit her mother-in-law's gravesite at Rose Hills (the cemetery). It was bright and sunny. She brought with her flowers. After trimming the stems at the gravesite, Norwood walked across the road to a trash container where she discarded the rose clippings. There were no cars on the road when Norwood crossed it.

To reach the trash can, Norwood had to cross a gutter that bordered the road. The gutter was between the road and the trash can. The gutter was slanted and measured 37 inches. The trash container was set on a concrete pad, a short distance from the gutter.[1] A water faucet and a pipe were near the trash can. The faucet was 3 to 6 feet away from the trash can, depending on where one stood to discard trash. The pipe and the faucet were set in, and arose vertically from, the concrete pad. The pipe was 1 inch in diameter and 17-7/8 inches tall. The pipe was 5 or 6 inches from the faucet. The pipe had been placed next to the faucet to

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[1] The parties interchangeably discussed the pad and the gutter as being "concrete" or "cement."

protect the faucet from being damaged by lawnmowers and machinery. The water faucet had been installed so guests could fill flower vases with water.

There was a wet patch on the concrete pad. The flat surface portion of wet cement was five inches by five inches. The dimensions of the entire wet area cannot be ascertained from the record. The wet patch surrounded both the faucet and the pipe upon which the faucet was placed, and water flowed downward and drained into the gutter.

Although nothing obstructed Norwood's view, she did not see the wet patch or the pipe when she approached the trash can. She focused on the trash can and stood at an angle to it. After Norwood placed the rose clippings in the trash can, she turned to her left, and as she did so, her right foot slid out from under her on slime. As Norwood fell to the ground, she was impaled on the pipe, which punctured her lung and liver.

Norwood was taken to the hospital. That afternoon, her husband took photographs of the accident site and of Norwood's shoes. The photographs showed mud and algae on the bottom of the shoes.

Prior to the accident, no one had informed Rose Hills that the faucet leaked or that there was water, slime, or mud around the faucet. Prior to this accident there have been no reported instances of anyone slipping and falling on wet concrete at this particular location.[2]

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[2] As we discuss below, in opposing the summary judgment, Norwood submitted the declarations of two experts. The trial court excluded both declarations in their entirety. One expert (Brad Avrit) visited Rose Hills two years after the accident. He submitted photographs taken during his visit and a physical description of the premises. He measured the slant of the gutter, the height and width of the pipe and faucet, and distances between the various items. Other than the measurements relating to the size of a wet spot on the cement, Rose Hills did not object to these objective findings. There is no information in the record that the accident site, including the faucet, pipe, gutter, or cement pad upon which the trash can was placed, had changed over the years. Further, in the trial court's minute order granting summary judgment the trial court relied upon some of these measurements, as well as Avrit's photographs. Since the trial court relied upon

2. *Procedure.*

a. *The complaint.*

On April 18, 2007, Norwood sued Rose Hills. Her complaint contained two causes of action. In her premises liability cause of action, she alleged that as "[s]he went to dispose of the cuttings and when she turned to rejoin her husband she slipped on wet slimy concrete and fell onto a pipe sticking out of the ground by a leaking faucet." In her negligence cause of action, Norwood alleged Rose Hills had a "duty to maintain [its] walkways in a reasonably safe condition, and to inspect, identify and repair the leaking faucet and walkway which presented slipping hazards. [¶] [Rose Hills] failed to maintain [its] property in a safe manner by allowing faucets to leak constantly and allowing slime to form on the concrete where pedestrians traversed. Pipes and faucets were left sticking out 1 to 2 feet above the ground without adequate protection. The faucet pipe and pipe were placed far enough away from the trash receptacle to allow a person to walk between the pipes and the trash bin and [Rose Hills] failed to warn invited guests of the dangerous condition with any signs or restricted area."

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certain statements in the declarations and the parties have not contested other statements, we accept those facts as true. Therefore, we have omitted the facts contained in the two declarations and have not considered Avrit's photographs, unless in its pleadings below or on appeal Rose Hills accepted a specific factual measurement or the trial court relied on this information.

Thus, for example, we have omitted from the statement of facts the following information, even though there appears to be no reason for the trial court to have eliminated them from consideration: The faucet is 16 inches tall and 1 inch in diameter. The faucet is 14-1/2 inches from the trash can. The top of the pipe was smooth and rounded on the sides. The distance between the mid-point of the gutter and the faucet is 23 inches. The slope of the portion of the gutter near the faucet is 21.9 percent. The gutter is 37 inches wide. The slope from the mid-point or the bottom portion of the gutter as it arises to the trash can is 48.9 percent.

Because we reverse on the merits, we need not discuss the merits of the court's ruling on the evidentiary objections.

b. *Rose Hills's motion for summary judgment.*

On March 7, 2008, Rose Hills moved for summary judgment. Rose Hills argued the wet concrete where Norwood fell was not a dangerous condition, constituted a trivial defect, and was open and obvious**.** Rose Hills argued that "no reasonable person could conclude that the wet portion of concrete created a 'substantial risk of injury' . . . ." Rose Hills further argued that a reasonable person in Norwood's position would have seen the wet concrete on that clear and bright day and "either avoided it . . . or used extra care when walking on it." In support of this argument, Rose Hills relied on photographs taken by Norwood's husband to demonstrate that the water from the faucet drained directly into the gutter, and that the flat-surface portion of the wet cement was small and avoidable.

In opposing the motion, Norwood contended that the following circumstances, taken together, constituted a dangerous condition that was not trivial: concealed mud and algae adjacent to the leaking faucet accumulated on the sloping concrete walking surface, adjacent to an unprotected, bollard pipe (a known impalement hazard), by a trash can where pedestrians were invited to walk. She argued that the slippery nature of the concrete walking surface and the accumulated mud and algae were neither open nor obvious.

Norwood submitted two expert declarations. The first was from engineer Brad Avrit who had experience in conducting safety investigations and analysis of premises. In formulating his opinions, Avrit relied upon Norwood's deposition and his own inspection of the premises conducted in August 2007, during which he measured the accident scene. Avrit declared, in part, that the concrete area was rough, but that the cement under the wet area had become smooth, creating a walking hazard because it was no longer slip resistant. He opined that "[a] person approaching a wet sidewalk would not expect the surface to be a slipping hazard. Sidewalks are constructed of concrete and are designed to provide sufficient slip resistance to enable a person to walk safely over them when wet . . . . The danger of the surface where Ms. Norwood fell was that its slippery nature was caused by a

combination of the slope, smooth texture, and the accumulation of the mud and algae that was not obvious and was not readily apparent, except on close inspection."

Avrit also declared that pedestrians "walking to the trash can would likely not appreciate the impalement hazard posed by the pipe. The pipe on which Ms. Norwood fell presented what is recognized in the construction and safety industries as an impalement hazard. OSHA regulations require rebar to be capped in order to spread the weight or 'load' of a falling person over a greater area of his body, thereby minimizing injury. The pipe on which Ms. Norwood fell, which *is similar to a piece of rebar,* should have been capped to minimize or prevent the type of injury sustained by Ms. Norwood. . . . [¶] The overall circumstances presented by the area where Ms. Norwood fell were unreasonably dangerous and were not trivial in nature. [The smooth surface, and the mud and algae, created] slipping hazards . . . located adjacent to a significant impalement hazard and a trash can, which, by its very nature, would draw people's attention to the trash can itself to dispose of their garbage. While a pedestrian's focus would be drawn to the trash can (as was Ms. Norwood's) the pedestrian is unlikely to be aware of or recognize the danger posed by the wet, smooth, slippery and sloped concrete adjacent to a significant impalement hazard." (Italics added.) Avrit's declaration included measurements of the accident scene, including those of the distances between various items and of the items themselves. Avrit attached to his declaration photographs he had taken in August 2007 depicting the area and a photograph of an OSHA compliant rebar cap. (See fn. 2.)

Norwood also submitted the declaration of Richard Allen Schmidt, a professor of psychology, who was an expert in the field of human factors, ergonomics, and kinesiology. Schmidt addressed how people walk and what happens if a person expects one type of surface, but encounters another. He declared the following. Persons walking on a surface known to be slippery will walk differently than if the surface is dry. When Norwood stepped away from the

trash can, she "expected that the friction would be sufficient to bear the weight of her body. But because the concrete was unexpectedly slippery because of the algae and mud, the surface of her heel and weight of her body overcame friction and she slipped. Because her left foot was in the process of unloading her weight, the disruption of the expected movement was sufficient to cause Mrs. Norwood to fall. [¶] . . . The concrete walking surface encountered by Mrs. Norwood on [Rose Hills's] property was unsafe. The mud and algae on the smooth, wet, sloping concrete presented a hidden slippery hazard. The danger was hidden because a person such as Mrs. Norwood would not expect wet concrete to be as slippery as it was. The mud and algae were dark, blending in with the wet concrete and so would not be noticed by a pedestrian such as Mrs. Norwood who was approaching the trash can."

Rose Hills objected to the declarations of Avrit and Schmidt.

The trial court's May 23, 2008 tentative ruling issued before the hearing of that date was to *grant* the motion. However, in its subsequently entered order of June 3, 2008, the trial court *denied* the motion. The trial court concluded that Avrit's photographs had no probative value because they were taken two years after the accident, but his "opinion that the rebar pipe should have been capped to minimize or prevent injury [was] admissible."

c. *Rose Hills's clarification motion.*

Ten days later, Rose Hills filed a motion pursuant to Code of Civil Procedure section 437c, subdivision (g) for "clarification" of the order denying summary judgment.[3] In this pleading, Rose Hills relied mostly on the findings of

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[3] Code of Civil Procedure section 437c, subdivision (g) reads:

"Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. Upon the grant of a

the trial court in its tentative order that had been to grant the motion. Rose Hills asked the trial court to clarify its order denying the motion for summary judgment by issuing additional findings of fact and conclusions of law and requesting rulings on its evidentiary objections. Rose Hills stated that its motion was *not* a motion for reconsideration, but urged the trial court to reconsider its prior ruling, on the court's own motion, and to consider the new facts it was presenting. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094.)

Specifically, Rose Hills requested the trial court reconsider its finding that the pipe was "rebar." Rose Hills argued the pipe was a bollard pipe and thus, was not required to be capped. Rose Hills asserted that Avrit's conclusions should be discarded because he had used an OSHA regulation that applied to rebar and not to bollard pipes. Rose Hills stated, "A bollard is a vertical post that provides protection to an area or thing and is meant to create a safe environment. Rebar, on the other hand, is 'a steel rod with ridges for use in reinforced concrete.' [Citations.]" Among other items, Rose Hills attached photographs depicting rebar.

Norwood opposed Rose Hills's motion. Norwood argued Rose Hills failed to explain why the "new facts" had not been presented earlier, and Norwood suggested Rose Hills was making a motion for reconsideration under the guise of a Code of Civil Procedure section 437c, subdivision (g) motion. Norwood also argued the motion was not a clarification motion. (Code Civ. Proc., § 437c, subd. (g).) Norwood attached to her opposition the photograph of the bottom of her shoes taken by her husband on the day of the accident, that had been attached to her deposition.

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motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order."

In its reply, Rose Hills requested a ruling on whether it had a duty to warn. Rose Hills did *not* contest Norwood's statement that the photograph of the soles of her shoes taken on the day of the accident depicted mud and algae.

Rose Hills's motion was heard on September 5, 2008. The trial court issued a tentative ruling granting summary judgment, construing and granting the clarification motion as a motion for reconsideration, and also ruling that it had the inherent authority to reconsider its prior ruling, which it chose to do.

On September 25, 2008, the trial court entered a formal order granting summary judgment. The court construed Rose Hills's motion for clarification as one seeking reconsideration pursuant to Code of Civil Procedure section 1008. The court stated that "the nature of the 'vertical' pipe at the scene [was] new evidence which should be considered . . . ." Additionally, the court exercised its inherent authority to reconsider its prior ruling. The court stated that Norwood had relied on Avrit's declaration in which Avrit opined that rebar pipes were subject to OSHA regulations and that because the pipe upon which Norwood fell was uncapped, it created an impalement hazard. The trial court stated that its prior finding that there were triable issues of fact was based on Avrit's opinion that the "vertical pipe depicted was a 'rebar.' [But, Rose Hills has now shown that the pipe was not rebar and thus not subject to OSHA regulations. This] new fact is a proper ground for reconsideration. [¶] Disregarding Avrit's testimony as irrelevant, . . . the area in which [Norwood] fell did not constitute a dangerous condition as a matter of law." The trial court further held that the photographs taken by Norwood's husband demonstrated that "the person using the trash receptacle had ample room to approach [the trash can] from any angle without stepping into the wet area. [Rose Hills showed] that there have been no prior, similar, incidents reported. [¶] The photographs (those taken by [Norwood's] husband, as well as those taken by [Avrit]) also show the placement of a pipe adjacent to the water faucet to protect the faucet from lawnmowers. . . . Moreover, the presence of the vertical pipe did not obstruct [Norwood's] view or otherwise

cause her to slip and fall. . . . [¶] There is no evidence of any aggravating physical circumstances, such as poor lighting or debris, which would heighten the risk of injury. The Court finds that the risk created by the wet concrete was minor, and that no reasonable person would conclude that the condition created a substantial risk of injury when used with due care." The court sustained the objections to the declarations of Avrit and Schmidt in their entirety.

Norwood appealed on October 28, 2008. On December 19, 2008, the trial court entered a stipulated judgment in favor of Rose Hills, to which the parties had agreed on the basis of the court's ruling granting summary judgment.[4] We reverse because there are triable issues of fact.

III.

ISSUES

We are called upon to decide whether Rose Hills has shown that there are no triable issues of fact as to whether there was a dangerous condition on its land. We must also address, if there was a dangerous condition, if it was open and obvious such that there was no duty to warn or if it was trivial. We further consider if Rose Hills has shown that it had no obligation to rectify an open and obvious condition on its land.

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[4] Although Norwood filed her notice of appeal prior to the December 19, 2008 entry of judgment, we shall exercise our discretion to treat the appeal as taken from the final judgment. (*Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 14, fn. 1; Cal. Rules of Court, rule 8.100(a)(2) [notice of appeal, which must be liberally construed, "sufficient if it identifies the particular judgment or order being appealed"]; Cal. Rules of Court, rule 8.104(e) [reviewing court may treat premature notice of appeal as filed after entry of judgment].)

IV.

DISCUSSION

A. *The fact that the trial court, on its own motion, reconsidered its prior ruling does not prevent us from addressing the substantive issue.*

Norwood first argues the trial court erred in treating Rose Hills's motion for "clarification" as one for reconsideration pursuant to Code of Civil Procedure section 1008. Norwood contends (1) there were no "new" facts and Rose Hills failed to provide a satisfactory explanation for the failure to provide the new fact evidence earlier; and (2) even if the trial court had the inherent authority to treat the clarification motion as a motion for reconsideration, the trial court erred in failing to provide proper notice to Norwood that it was doing so.

We need not address the first procedural issue raised, because the second is dispositive. With regard to the second procedural issue, Norwood concedes that pursuant to the holding in *Le Francois v. Goel*, *supra*, 35 Cal.4th 1094, trial courts have the inherent power to reconsider, on their own motion, a summary judgment ruling. However, Norwood argues that if this occurs, the following language from *Le Francois* necessitates notice to the parties by the trial court that it intends to review the issue on its own motion: "Unless the requirements of [Code of Civil Procedure] section 437c, subdivision (f)(2), or [Code of Civil Procedure section] 1008 are satisfied, any action to reconsider a prior interim order must formally begin with the court *on its own motion.* To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been erroneous, and thus that it might want to reconsider that ruling on its own motion -- something we think will happen rather rarely -- it should inform the parties of this concern, solicit briefing, and hold a hearing. (See *Abassi v. Welke* [2004] 118 Cal.App.4th [1353,] 1360 ['The trial court invited [the cross-defendant] to file a second summary judgment motion indicating it wanted to reassess its prior ruling . . . . The parties had an opportunity to brief the issue, and a hearing was held.']; *Schachter v. Citigroup, Inc.* [2005] 126 Cal.App.4th [726,]

739.) Then, and only then, would a party be expected to respond to another party's suggestion that the court should reconsider a previous ruling. This procedure provides a reasonable balance between the conflicting goals of limiting repetitive litigation and permitting a court to correct its own erroneous interim orders." (*Le Francois v. Goel, supra*, at pp. 1108-1109.)

Here, in its "clarification motion" Rose Hills requested the trial court reconsider its ruling denying summary judgment, on the court's own motion. The parties briefed the issues. A hearing was held. However, the trial court did not inform Norwood before it issued its September 5, 2008 tentative order on the day Rose Hills's clarification motion was to be heard, that it would be reevaluating Rose Hills's motion for summary judgment. However, contrary to Norwood's appellate argument, this procedural error does not mean that the case must be returned to the trial court for further briefing. Any error was harmless to Norwood.

Norwood had notice that the trial court was being called upon to review its prior ruling. Rose Hills's pleadings put Norwood on notice it was asking the trial court to reconsider the prior ruling. Rose Hills presented an argument on appeal, notifying Norwood that we would be addressing it if the lack of notice was prejudicial to her. Yet, Norwood did not detail the additional evidence or arguments she would have presented in the trial court had the court given her specific notice that it was going to revisit its prior ruling. (*People v. Edward D. Jones & Co.* (2007) 154 Cal.App.4th 627, 635-636; compare with *Le Francois v. Goel, supra*, 35 Cal.4th at p. 1109, fn. 6 [defendants made no harmless error argument on appeal and trial court did not inform the parties that, on its own motion, it might change its prior ruling; hence Supreme Court could not conclude lack of notice by trial court that it was reconsidering its ruling was harmless].) Thus, even if the trial court was obligated to provide notice to Norwood that it was reconsidering its ruling, we can find no prejudice to her. (Cal. Const., art. VI, § 13 [reversible error exists only if there has been a miscarriage of justice]; (*In re*

Marriage of Barthold (2008) 158 Cal.App.4th 1301, 1313 [trial court's erroneous procedural ruling reversed only if substantially incorrect].)

Further, as we discuss below, we hold that there are triable issues of fact. Thus, on the substantive issue, the trial court erred in granting summary judgment to Rose Hills. It would be an unnecessary waste of judicial resources to return the matter to the trial court. We now turn to the substantive issues.

B. *There are triable issues of fact and thus, summary judgment was improperly granted by the trial court.*

1. *Standard of review on summary judgment.*

We must evaluate if the trial court properly granted summary judgment. " 'Summary judgment is properly granted where there are no triable issues of fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision granting a summary judgment de novo. In doing so, we liberally construe all conflicting facts in the light most favorable to the party opposing the motion. [Citations.]' [Citation.]" (*Baudino v. SCI California Funeral Services, Inc.* (2008) 169 Cal.App.4th 773, 781.)

"A defendant moving for summary judgment bears the burden of showing that a cause of action has no merit because plaintiff cannot establish an element of the claim or because defendant has a complete defense. If the defendant makes this showing, the burden then shifts to the plaintiff opposing the summary judgment motion to establish that a triable issue of fact exists as to these issues. [Citations.]" (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741, citing among others, Code Civ. Proc., § 437c, subds. (a), (p)(2).) However, the party requesting summary judgment must meet his or her burden before the opposition needs to oppose the assertions claimed by the moving party. (Code Civ. Proc., § 437c, subd. (p)(1) & (2).)

2. *The evidence upon which we can rely.*

The key to any summary judgment motion is whether there was admissible evidence demonstrating triable issues of fact. The court may only consider admissible evidence and the supporting declarations demonstrating that the declarant is "competent to testify to the matters stated in the . . . declarations." (Code Civ. Proc., § 437c, subd. (d).) Expert opinions that have the proper foundation can create triable issues of fact. (Cf. *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487.) Thus, an expert opinion that lacks the proper foundation is not admissible. (*Nardizzi v. Harbor Chrysler Plymouth Sales, Inc*. (2006) 136 Cal.App.4th 1409, 1415.)[5]

The trial court's ruling with regard to the use of the expert declarations submitted by Norwood is inherently contradictory. The trial court sustained Rose Hills's objections to the declarations of Avrit and Schmidt in their entirety, yet the court also relied upon measurements and photographs Avrit had taken. (See fn. 2.) Also, even if some of the statements in the declarations of Avrit and Schmidt lacked evidentiary foundation, many statements contained therein were admissible. Further, the trial court misconstrued Avrit's declaration by characterizing it as having stated that the uncapped pipe *was* rebar, when in fact Avrit stated it was *similar* to rebar. Because we reverse the summary judgment on the merits, we need not dissect the declarations to determine which parts were admissible. It is important to note, however, that the trial court ignored critical evidence by not taking into consideration Norwood's statements that the surface

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[5] "Generally, a party opposing a motion for summary judgment may use declarations by an expert to raise a triable issue of fact on an element of the case provided the requirements for admissibility are established as if the expert were testifying at trial. [Citations.] An expert's opinion is admissible when it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .' (Evid. Code, § 801, subd. (a).) Although the expert's testimony may embrace an ultimate factual issue (Evid. Code, § 805), it may not contain legal conclusions. [Citation.]" (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 472.)

upon which she fell was slippery and that she had fallen on slime. The court also ignored the photographs of the bottom of Norwood's shoes depicting mud and algae and other circumstances, such as the slant of the gutter.

3. *The theories presented.*

In Norwood's two causes of action for premises liability and negligence, Norwood alleged Rose Hills maintained a dangerous condition, which caused her injuries. She also alleged Rose Hills should have warned about the condition. Rose Hills convinced the trial court that there were no triable issues of fact because there was no dangerous condition, and any defect was trivial, and the danger was open and obvious.

The concept of a dangerous condition is most clearly articulated in cases against governmental entities. A "dangerous condition" is a "condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) "The existence of a dangerous condition ordinarily is a question of fact, but the issue may be resolved as a matter of law if reasonable minds can come to only one conclusion. [Citation.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1133; accord, *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1194.)

"A condition is not a dangerous condition . . . if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (Gov. Code, § 830.2; see also, *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927.) The concept of a trivial defect is applied to governmental entities and non-governmental entities. (*Dina v.*

People ex rel. Dept. of Transportation (2007) 151 Cal.App.4th 1029, 1053; *Caloroso v. Hathaway, supra,* at p. 927; *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 397.) "Courts have referred to this simple principle as the 'trivial defect defense,' although it is not an affirmative defense but rather an aspect of duty that plaintiff must plead and prove." (*Caloroso v. Hathaway, supra,* at p. 927.) To determine if a condition is "trivial" all surrounding circumstances are examined. If reasonable minds can differ, the determination as to whether a defect is trivial is one of fact; it is a question of law only if reasonable minds cannot differ. (*Dolquist v. City of Bellflower* (1987) 196 Cal.App.3d 261, 268.) In making this determination, courts should consider all aspects of the accident, including the condition of a walkway, if debris, grease or water concealed a defect, if the accident occurred in an unlighted area, or if something else obstructed plaintiff's view of the defect. (*Caloroso v. Hathaway, supra,* at p. 927.)

Landowners are not insurers of safety, but must use reasonable care to maintain their property "in a reasonably safe condition." (*Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 121.) "Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. [Citation.]" (*Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393.) Thus, if the hazard is apparent so that an invitee can reasonably be expected to avoid it, the landlord is not liable. (E.g., *Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1385.)

4. *There are triable issues of fact.*

We are reminded of our burden of review. We must construe the evidence, and all reasonable inferences derived therefrom, liberally in favor of Norwood. (*Baudino v. SCI California Funeral Services, Inc., supra,* 169 Cal.App.4th at p. 781.) Rose Hills, which has the burden of proof to show that there were no triable issues of fact, frames the issue narrowly by focusing solely on the wet patch. By doing so, Rose Hills ignores the totality of circumstances. (Gov. Code,

§ 830.2 [dangerousness of condition must be evaluated in light of the total circumstances].)

Evidence extracted from Norwood's deposition reveals that after she put the rose clippings into the trash can, she turned, slipped, and was impaled by the exposed pipe. She also testified that the surface was slippery and she fell on slime.[6] We have reviewed the photographs of the area taken by Norwood's husband soon after the accident. They showed an uncovered pipe sticking up from the cement, placed five to six inches from the faucet, near the trash can. The pipe was surrounded by the wet spot and in close proximity to the sloping gutter and water draining downward into the ditch. The photographs of Norwood's shoes appear to confirm that she fell on mud and algae. Rose Hills acknowledged that there was a slant or elevation to the area, as the gutter was designed to catch water that came from the faucet. From this evidence, a reasonable trier of fact could conclude that the area was moist or wet for a sufficient time to allow algae to grow and mud to accumulate.[7] A reasonable trier of fact also could conclude that because the pipe had no protective covering and because it was narrow and uncapped, and Norwood was impaled on it when she fell, that it was an impalement hazard.[8] Further, a reasonable trier of fact could conclude that given the proximity of the uncapped pipe five inches from the faucet and the slippery area, the debris hidden from view, the slant of the premises, that Rose Hills maintained a dangerous condition on its property.

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[6] At oral argument, Rose Hills pointed to an excerpt of Norwood's deposition in which she stated that she could not "tell . . . what it was that [she] slipped on." However, this was in addition to other statements in which she said that the surface was slippery and she fell on slime.

[7] As Rose Hills states, there was no evidence that the faucet leaked. This fact does not alter the analysis as Rose Hills admitted that water drained downward and into the ditch.

[8] Rose Hills acknowledges that rebar is sharp and narrow, and thus inherently dangerous. The same could be said of the bollard pipe upon which Norwood fell.

These physical characteristics of the accident scene also defeat Rose Hills's argument that, as a matter of law, the condition of its land was open and obvious to Norwood. We acknowledge that in some situations, water on wet pavement can be considered open and obvious, as a matter of law. For example, in *Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, the appellate court held that a wet spot on concrete was open and obvious where the plaintiff admitted to seeing it before she fell. Similarly, in *Mathews v. City of Cerritos, supra,* 2 Cal.App.4th 1380, a municipality was not held liable when a child, who knew the hill was too steep and dangerous, rode down a steep, wet, grassy hill on his bicycle.

In contrast, Norwood testified that she did not see the wet patch because she was concentrating on the trash can. Additionally, the question is not resolved solely on whether the wet patch or the pipe and faucet were in plain view, or that it was a bright and sunny day. Rather, it is also necessary to consider whether Norwood would have seen the slippery debris of the algae and mud hidden under the accumulated water, understood the dangers of the slant of the gutter and the pipe, and understood that she should have taken a different route. Construing the facts in favor of Norwood, a reasonable trier of fact could conclude that the danger was not apparent and would not be appreciated by a pedestrian. (Compare with, *Matherne v. Los Feliz Theatre* (1942) 53 Cal.App.2d 660, 666 [trial court properly granted judgment notwithstanding the verdict to landowner where plaintiff slips on water dripping from ceiling during rain]; *Walker v. Greenberger* (1944) 63 Cal.App.2d 457, 461-462 [nonsuit in favor of market affirmed where plaintiff, who slipped, knew water and trimmings from vegetables were in market and they were apparent].)

Further, even if the danger to Norwood was "open and obvious," Rose Hills was not relieved of "all possible duty, or breach of duty, with respect to it. [While] the obvious appearance of the wet pavement [may excuse a] defendant from a duty to warn of it[,] the obviousness of a condition does not necessarily

excuse the potential duty of a landowner, not simply to warn of the condition but to rectify it. The modern and controlling law on this subject is that 'although the obviousness of a danger may obviate the duty to *warn* of its existence, if it is *foreseeable* that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it), there may be a duty to *remedy* the danger, and the breach of that duty may in turn form the basis for liability . . . .' [Citations.] [¶] . . . The palpable appearance of the wetness may itself have provided a warning of the slippery condition, excusing [a] defendant from having to do so. But it may yet have been predictable that despite that constructive warning, the wet pavement would still attract pedestrian use." (*Martinez v. Chippewa Enterprises, Inc., supra*, 121 Cal.App.4th at pp. 1184-1185.)

Here, the wet cement was near a trash can and a faucet provided to guests of the cemetery to enable them to water their flowers. As such, Rose Hills would have known that guests would traverse the wet pavement. Whether Rose Hills will be charged with the duty to remedy the situation "depends upon a number of as yet unresolved factors, such as the foreseeability of harm, [Rose Hills's] advance knowledge *vel non* of the dangerous condition, and the burden of discharging the duty. (See *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)" (*Martinez v. Chippewa Enterprises, Inc., supra*, 121 Cal.App.4th at p. 1185.) Rose Hills, as the moving party, had the burden to provide facts justifying a favorable decision in its favor. However, the facts presented, including that Rose Hills had no notice of prior persons slipping and falling, do not permit us to resolve this issue as a matter of law. Rather, there are many unknowns, including the costs to remedy the problem, and if the algae and mud were discernable to a person walking to the trash can or to the faucet.

Lastly, Rose Hills argues that any defect was trivial. Rose Hills states that the "wet patch did not create anything close to a 'substantial' risk of harm to a reasonably attentive pedestrian." When the trial court addressed the issue, it

incorrectly stated, that "There is no evidence of any aggravating physical circumstances, such as poor lighting or debris, which would heighten the risk of injury." The trial court's ruling and Rose Hills's argument on appeal omit from the discussion the hidden debris (the algae and mud) and give little weight to the totality of circumstances. As discussed above, a trier of fact could reasonably find the danger of the surface where Norwood fell is a result of a combination of the proximity of the uncapped pipe to the wet and slippery cement, the slope of the gutter, and the accumulation of the mud and algae that was not obvious and was not readily apparent, except on close inspection. From these facts, a reasonable trier of fact could conclude, that the defect was not trivial.

Thus, the summary judgment must be reversed and the matter returned to the trial court. Upon remand, a trier of fact will determine if there was a dangerous condition, if the condition was open and obvious, and if it was trivial in nature. The parties will also have the opportunity to litigate if Rose Hills had the duty to remedy any danger.

V.

DISPOSITION

The judgment is reversed. Rose Hills is to bear all costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J. KITCHING, J.